PENGARAH INSTITUT PENYELIDIKAN PERUBATAN & ANOR.

v.

INTHRA DEVI S. NADESON & ANOR.

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 411 OF 1986]
5 AUGUST 1987

TORT: *Damages - Cost of plastic and psychiatric therapy treatment at private clinic - Treatment available in government hospital - Whether 1st respondent entitled to claim cost of treatment at private clinic.*

TORT: *Earning capacity - 1st respondent will lose her job in future - Whether there must be substantial or real risk 1st respondent might lose her job.*

TORT: *General damages Claim by 1st respondent's husband for household work and looking after children - Special damages - Loss of two weeks' wages and payment to nephew to look after children - Question of proof.*

This was an appeal against the awards made by the High Court, Kuala Lumpur, in a claim for damages by the 1st and 2nd respondents, the wife and husband respectively.

Held:

[1] The appeal against the award of RM80,000 as general damages with interest of 8% per annum from date of service of writ to date of realisation made in favour of the 1st respondent was dismissed on the grounds that on the special circumstances of this case the award should not be disturbed although it would appear to be a bit on the generous side.

[2] The appeal against the award of the cost of plastic surgery at RM46,152 with no order as to interest and cost of psychiatric therapy treatment at RM10,500 was allowed because the awards are not tenable on the law and on the facts.

[3] As regards the award on loss of earning capacity there is no evidence that the 1st respondent will lose her job as a dental surgery assistant. It is trite law that before loss of earning capacity can be awarded the Court must come to a conclusion that there is a substantial or real risk that the plaintiff might lose her job at some future date and not merely a speculative or risk of losing the job. The award was accordingly quashed.

[4] The general damages of RM10,000 awarded in favour of the 2nd respondent was not interfered with as the injuries sustained and the fact that the husband had to do most of the household work was not denied. However, the appeal against the award on the loss of two weeks' wages and payment to the nephew to look after the children was allowed as they are special damages but not proven.

[Orders made as aforesaid. Appellants awarded half the costs of appeal.]

For the appellants - Tee Geok Hock, FC
For the respondents - R.K. Nathan; M/s. R.K. Nathan & Co.

JUDGMENT

Hashim Yeop Sani SCJ:

This was an appeal against the awards made by the learned Judge in a claim for damages made by the two respondents. The first respondent is the wife and the second respondent is the husband. The wife was at the material time and still is employed as a dental surgery assistant with the institute for medical research.

The first respondent was injured when the door of an autoclave burst open throwing out surgical instruments and boiling water upon her resulting in her sustaining severe burns. It was alleged that the appellants were negligent in failing to provide a safe and proper place of work and failing to take precautionary measures to prevent the accident. The respondents also alleged breach of statutory duty under the Factories and Machineries Act 1967.

The second respondent claimed that prior to the accident he had a normal happy married life but not so after the accident. He alleged that after the accident he had to do all the household work including looking after the two children. Both respondents then claimed for general and special damages.

The learned Judge after hearing witnesses from both sides found the claims proven against the appellants and made the awards appealed against.

In respect of the first respondent the learned Judge awarded RM80,000 as general damages with interest of 8% per annum from date of service of writ to date of realisation. We would classify this as award "A" for the purpose of this appeal. The learned Judge also handed down two other awards, namely cost of plastic surgery at RM46,152 with no order as to interest and cost of psychiatric therapy treatment at RM10,500 also with no order as to interest. We will classify these as award "B" for the purpose of this appeal. The learned Judge also handed down an award of RM20,000 for loss of earning capacity, also with no order as to interest. We will classify this as Award "C" for the purpose of this appeal. The fourth award made by the learned Judge in favour of the first respondent was agreed special damages which is not the subject of the appeal.

As regards the second respondent the learned Judge made an award of RM10,000 as general damages which is the subject of this appeal. The only other award in respect of the second respondent which is subject of this appeal is the award for loss of two weeks' wages (RM250 and payment of RM300 to nephew of the second respondent to look after the children) total - RM550 with 4% interest from the date of accident to the date of realisation.

To get a clear perspective of the awards it may be necessary to fall back on some evidence adduced before the learned Judge. According to medical report dated 28 January 1984 submitted in bundle A at p. 1, the first respondent sustained 65% first and second degree burns involving parts of the face, trunk, both thighs and both upper limbs. She underwent surgery on two separate occasions where areas with skin loss were covered with split skin grafts. She subsequently developed keloids over the burn areas and is being treated with compression garments (bundle A p. 2 - medical report dated 27 February 1984).

In his latest report on the first respondent dated 2 July 1985 (Exh. D) Dr. Sivaloganathan (PW1) stated as follows:

As a result of burns she has extensive keloid scar involving almost the whole of the front of the body, left upper limb, both thighs in front, and areas behind the knees and legs. She also has pigment problem involving almost the whole body.

In my opinion she will be needing continuing medical and surgical care almost throughout her life. It can be categorically stated that she will never be the same person both physically and mentally as before the accident.

Surgery will have to be done in stages to gain functional improvement and also some cosmetic improvement. It is impossible to predict as to how many surgical procedures she would need.

Based on the above consideration I find myself in a position of dilemma to fix a sum for medical rehabilitation.

Dr. Sivaloganathan (PW1) said it would cost between RM3,000 and RM5,000 annually for surgical rehabilitation throughout the respondent's life both cosmetic and functional.

Dr. Prof. Deva Das (PW2), a psychiatrist, stated that the first respondent was very distressed mentally since the traumatic incident. She sustained severe burns to her body resulting in disfiguring keloids. The keloids were a constant source of pain and mental and physical distress to her. PW2 concluded that the first respondent would require indefinite psychiatric therapy throughout her life.

Also tendered in evidence on behalf of the appellants was what was taken to be-undertaking by Dr. Lim Teong Wee (DW1), the head of the institute for medical research in a letter dated 6 February 1986 (Exhibit D12) addressed generally to whom it may concern and which letter reads as follows:

On behalf of the Government of Malaysia, I confirm that in accordance with the provisions of Bab. F General Orders, applicable to Inthra Devi, she is entitled to free medical and surgical treatment.

In this context, she can be provided, on her request, with medical and surgical care with a view to her functional improvement, and further she can be provided with cosmetic surgery when she is psychiatrically and psychologically stable and request the same in respect of the injuries/burns arising out of an autoclave accident on 7 April 1983.

On a proper reading of this document it would seem clear that it is not really an undertaking as such but a "to whom it may concern" letter certifying the fact that the first respondent is a government servant who under the General Orders is entitled to get free medical treatment available at a government hospital.

At the conclusion of the hearing of the appeal in respect of the awards made in favour of the first respondent, we dismissed the appeal against award "A" on the grounds that on the special circumstances of this case we should not disturb the award although it would appear to be a bit on the generous side. We however allowed the appeal against award "B because the awards are not tenable on the law and on the facts. The learned Judge referred to the letter by DW1 in respect of the medical treatment which she should be entitled to as government servant to receive in all government hospitals but nevertheless made the award based on the evidence of the second respondent (the husband) who was "unhappy' with an incident at a government clinic. The learned Judge said in his judgment at p. 16:

She is entitled to free medical treatment in a government hospital. However in all the circumstances of this case I decided to allow her claim to have the surgery done at a private clinic. She had an unpleasant experience on a previous occasion at a government clinic.

Psychiatric therapy treatment is also the type of treatment which is available in any government hospital. In any case the award (award (iii)) should be considered as absorbed in award "A".

We therefore dismissed the awards on cost of plastic surgery and cost of psychiatric therapy treatment at a private clinic.

As regards the award on loss of earning capacity there is no evidence that the first respondent will lose her job as a dental surgery assistant. It is trite law that before loss of earning capacity can be awarded the Court must come to a conclusion that there is a substantial or real risk that the plaintiff might lose her job at some future date and not merely a speculative or risk of losing the job. The award was accordingly quashed.

As regards the general damages awarded in favour of the second respondent we decided not to interfere with the award looking at the injuries sustained and the fact that the husband now has to do most of the household work is not denied. We however allowed the appeal on the loss of two weeks' wages and payment to the nephew to look after the children as they are special damages but not proven.

At the conclusion of the appeal we made the orders as aforesaid and awarded to the appellants half the costs of the appeal.

Also found at [1987] 2 CLJ 420